HOM v HOP

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24F-338–11 OF 2023
EVROL MARIETTE PETERS J
24 MAY 2024

Family Law — Children — Custodianship — Application for joint custody — Whether joint custody, care and control of child should be given to child's maternal grandmother — Whether child's mother appointed joint guardianship for child — Whether child's father unfit as parent — Whether welfare of child paramount consideration — Whether grant of joint custody during ongoing legal dispute between guardians would create toxic environment for child — Whether sole guardianship and custody of child best served child's welfare

This was the plaintiff's application ('present application') for joint guardianship, as well as joint custody, care, and control of the defendant's child ('child'). The plaintiff was the maternal grandmother of the child, while the defendant was the father of the child, who was born in June 2010. The child's mother passed away in February 2020 ('deceased mother'). The child was now the sole beneficiary of the deceased mother's estate, as well as the maternal grandfather's estate, which the mother had inherited. The maternal grandfather passed away in December 2019 ('deceased grandfather'). In March 2023, the defendant and the child filed an application ('Suit No 1091'), against the plaintiff, the plaintiff's son ('uncle'), and other parties. The uncle served as the executor and trustee of the deceased mother's will, which was the central issue in Suit No 1091. In Suit No 1091, the defendant and child requested, among other things, an accounting of the deceased mother's estate. At the time of the hearing of the present application, Suit No 1091 was still pending. The crux of the plaintiff's contention in support of this application was that the child had been cared for by the plaintiff and her family, even when the deceased mother was alive. After the death of the deceased mother, the plaintiff claimed that she had continued to provide for the child financially and lavished the child with luxury. The plaintiff further asserted that the defendant had been an absent father, even during the deceased mother's lifetime. The issues that arose for determination were: (a) whether the deceased mother had appointed a guardian to the child; (b) whether the plaintiff should be granted joint guardianship, as well as joint custody, care, and control of the child, alongside the defendant; (c) whether the defendant was unfit as a parent; and (d) whether the plaintiff should be granted access to the child, considering the ongoing legal dispute in Suit No 1091.

Held, dismissing the application with costs:

(1) It was undisputed that he deceased mother had never appointed a joint guardian to act alongside the defendant. In fact, a previous court order explicitly recognised the defendant as the sole guardian of the child. This prior legal determination underscored the defendant's sole authority over decisions regarding the child's welfare, care, and upbringing, thereby reinforcing the legal basis for the defendant's current guardianship status. Further, there was no evidence indicating that the defendant was an unfit parent. On the contrary, the evidence demonstrated that the defendant had always been actively involved in the child's life. The records also showed consistent care and engagement from the defendant, reinforcing his capability as a responsible parent (see paras 12 & 22).

(2) While the child had spent significant time with her grandparents, the arrangement occurred with the defendant's consent. The defendant had not objected to these visits because the deceased grandfather was very fond of the child, and not as an abdication of parental responsibility. It would be inequitable to hold the defendant's decision, to permit the child to spend time with her grandparents, against him. Given this context, it was clear that the defendant had maintained his primary role in the child's upbringing and had not relinquished his parental responsibilities to the plaintiff or her family. Thus, the defendant should retain sole guardianship and custody of the child, as this would best serve the child's welfare and ensure stability in her care and upbringing (see paras 23–24).

(3) In view of the ongoing Suit No 1091 against the plaintiff and her family, granting guardianship and custody to the plaintiff, a joint basis would inevitably lead to conflict. The ongoing litigation signified a significant degree of discord and unresolved issues between the defendant and child on one hand, and the plaintiff and her family on the other. This discord would likely intensify if the plaintiff and defendant were required to share guardianship and custody responsibilities. Such a contentious environment would not be conducive to the child's welfare and could create an unstable and stressful situation for her. The evident acrimony between the plaintiff and defendant indicated future disputes, likely to create a toxic environment for the child (see paras 25 & 27).

(4) Witnessing ongoing conflict between her guardians, if the present application was allowed, could be emotionally harmful, leading to feelings of guilt, loyalty conflicts, and a sense of being caught in the middle. The child may also internalise the hostility between her guardians, affecting her self-esteem and interpersonal relationships. Such acrimony may also result in vastly different parenting styles and values, leading to inconsistency in discipline, routines, and expectations for the child. This lack of consistency could confuse the child and create additional stress. Further, joint guardianship and custody entail

co-parenting, requiring open communication, compromise, and a focus on the child's needs. In this case, the acrimony between the plaintiff and defendant would impede constructive communication, making it difficult to make joint decisions regarding the child's upbringing, education, healthcare, and other important matters (see paras 28–30).

(5) The plaintiff and her family felt entitled to dictate the terms of the child's upbringing, largely due to their control over financial resources. However, control of financial assets should not be the decisive factor in determining eligibility for guardianship and custody. there was a very high likelihood of the plaintiff and her family unduly influencing the child. In such circumstances, allowing this influence would be inappropriate. Therefore, it was prudent to deny even access to the child to the plaintiff, to safeguard the child's well-being and ensure an environment free from undue pressure (see paras 31–32).

(6) Maintaining a delicate balance in the grandparent-grandchild relationship was essential. While grandparents may offer valuable guidance and advice, it was crucial to respect the autonomy of the parents and their authority in decision-making regarding their children, particularly in situations where parents and grandparents were at odds. This was crucial to ensure that familial harmony was preserved and that conflicts were minimised, fostering a supportive and cohesive family environment where the needs and well-being of the children remain paramount (see para 35).

[Bahasa Malaysia summary

Ini adalah permohonan plaintif ('permohonan semasa') untuk penjagaan bersama, serta hak jagaan bersama, pemeliharaan, dan kawalan anak defendan ('anak'). Plaintif adalah nenek sebelah ibu kepada kanak-kanak itu, manakala defendan adalah bapa kepada kanak-kanak itu, yang dilahirkan pada Jun 2010. Ibu kanak-kanak itu meninggal dunia pada Februari 2020 ('mendiang ibu'). Kanak-kanak itu kini merupakan benefisiari tunggal harta pusaka arwah ibu, serta harta pusaka datuk sebelah ibu, yang diwarisi oleh ibunya. Datuk sebelah ibu meninggal dunia pada Disember 2019 ('mendiang datuk'). Pada Mac 2023, defendan dan kanak-kanak itu memfailkan permohonan ('Guaman No 1091'), terhadap plaintif, anak plaintif ('bapa saudara'), dan pihak lain. Bapa saudara adalah wasi dan pemegang amanah wasiat si mati, yang menjadi isu utama dalam Guaman No 1091. Dalam Guaman No 1091, defendan dan anak memohon, antara lain, perakaunan harta pusaka si mati. Pada masa pendengaran permohonan ini, Guaman No 1091 masih belum selesai. Inti pati pertikaian plaintif dalam menyokong permohonan ini adalah bahawa kanak-kanak itu telah dijaga oleh plaintif dan keluarganya, walaupun ketika arwah ibu masih hidup. Selepas kematian mendiang ibu, plaintif mendakwa dia terus memberi nafkah kepada kanak-kanak itu dari segi kewangan dan melimpahkan anak itu dengan kemewahan. Plaintif seterusnya menegaskan

bahawa defendan adalah bapa tidak pernah ada, walaupun semasa hayat ibu yang meninggal dunia. Isu-isu yang timbul untuk penentuan adalah: (a) sama ada mendiang ibu telah melantik penjaga kepada anak itu; (b) sama ada plaintif patut diberikan penjagaan bersama, serta hak jagaan bersama, pemeliharaan, dan kawalan kanak-kanak itu, bersama defendan; (c) sama ada defendan tidak layak sebagai ibu bapa; dan (d) sama ada plaintif patut diberi akses kepada kanak-kanak itu, dengan mengambil kira pertikaian undang-undang yang berterusan dalam Guaman No 1091.

Diputuskan, menolak permohonan dengan kos:

(1) Tidak dapat dipertikaikan bahawa mendiang ibu tidak pernah melantik penjaga bersama untuk bertindak bersama defendan. Malah, perintah mahkamah sebelum ini secara jelas mengiktiraf defendan sebagai penjaga tunggal kanak-kanak itu. Penentuan undang-undang terdahulu ini menggariskan kuasa tunggal defendan ke atas keputusan mengenai kebajikan, penjagaan dan didikan kanak-kanak, dengan itu mengukuhkan asas undang-undang untuk status penjagaan defendan semasa. Tambahan pula, tiada bukti yang menunjukkan bahawa defendan adalah ibu bapa yang tidak layak. Sebaliknya, keterangan menunjukkan bahawa defendan sentiasa terlibat secara aktif dalam kehidupan kanak-kanak itu. Rekod itu juga menunjukkan penjagaan dan penglibatan yang konsisten daripada defendan, mengukuhkan keupayaannya sebagai ibu bapa yang bertanggungjawab (lihat perenggan 12 & 22).

(2) Walaupun kanak-kanak itu telah menghabiskan masa yang banyak dengan datuk dan neneknya, pengaturan itu berlaku dengan persetujuan defendan. Defendan tidak membantah lawatan ini kerana mendiang datuk sangat menyayangi kanak-kanak itu, dan bukan sebagai melepaskan tanggungjawab ibu bapa. Ia adalah tidak adil untuk mengambil kira keputusan defendan, membenarkan kanak-kanak itu menghabiskan masa bersama datuk dan neneknya, terhadapnya. Memandangkan konteks ini, adalah jelas bahawa defendan telah mengekalkan peranan utamanya dalam pembesaran kanak-kanak dan tidak melepaskan tanggungjawab ibu bapanya kepada plaintif atau keluarganya. Oleh itu, defendan harus mengekalkan penjagaan dan hak jagaan tunggal kanak-kanak itu, kerana ini akan memberi manfaat terbaik kepada kebajikan kanak-kanak itu dan memastikan kestabilan dalam penjagaan dan didikannya (lihat perenggan 23–24).

(3) Memandangkan Guaman No 1091 yang berterusan terhadap plaintif dan keluarganya, memberikan penjagaan dan hak jagaan kepada plaintif, asas bersama sudah pasti akan membawa kepada konflik. Litigasi yang berterusan menandakan tahap perselisihan yang ketara dan isu yang tidak dapat diselesaikan antara defendan dan kanak-kanak di satu pihak,

dan plaintif dan keluarganya di pihak yang lain. Perselisihan ini mungkin akan bertambah teruk jika plaintif dan defendan dikehendaki berkongsi tanggungjawab penjagaan dan hak jagaan. Persekitaran perbalahan seperti itu tidak akan kondusif untuk kebajikan kanak-kanak itu dan boleh mewujudkan keadaan yang tidak stabil dan tertekan untuknya. Pertikaian yang jelas antara plaintif dan defendan menunjukkan pertikaian masa depan, berkemungkinan mewujudkan persekitaran toksik untuk kanak-kanak itu (lihat perenggan 25 & 27).

(4) Menyaksikan konflik berterusan antara penjaganya, jika permohonan sekarang dibenarkan, boleh membahayakan emosi, membawa kepada perasaan bersalah, konflik kesetiaan, dan rasa terperangkap di tengah-tengah. Kanak-kanak itu juga mungkin menghayati permusuhan antara penjaganya, menjejaskan harga diri dan hubungan interpersonalnya. Kekejaman sedemikian juga boleh mengakibatkan gaya dan nilai keibubapaan yang jauh berbeza, yang membawa kepada ketidakkonsistenan dalam disiplin, rutin dan jangkaan untuk kanak-kanak. Kekurangan konsistensi ini boleh mengelirukan kanak-kanak dan menimbulkan tekanan tambahan. Selanjutnya, penjagaan dan hak jagaan bersama memerlukan keibubapaan bersama, memerlukan komunikasi terbuka, kompromi dan tumpuan pada keperluan kanak-kanak. Dalam kes ini, pertikaian antara plaintif dan defendan akan menghalang komunikasi yang membina, menjadikannya sukar untuk membuat keputusan bersama mengenai didikan, pendidikan, penjagaan kesihatan dan perkara penting lain (lihat perenggan 28–30).

(5) Plaintif dan keluarganya berasa berhak untuk menentukan syarat-syarat didikan kanak-kanak itu, sebahagian besarnya disebabkan oleh kawalan mereka ke atas sumber kewangan. Walau bagaimanapun, kawalan aset kewangan tidak seharusnya menjadi faktor penentu dalam menentukan kelayakan untuk penjagaan dan hak jagaan. Terdapat kemungkinan besar plaintif dan keluarganya mempengaruhi kanak-kanak itu. Dalam keadaan sedemikian, membenarkan pengaruh ini adalah tidak wajar. Oleh itu, adalah bijak untuk menafikan walaupun akses kepada kanak-kanak kepada plaintif, untuk menjaga kesejahteraan kanak-kanak dan memastikan persekitaran yang bebas daripada tekanan yang tidak wajar (lihat perenggan 31–32).

(6) Mengekalkan keseimbangan yang halus dalam hubungan datuk nenek-cucu adalah penting. Walaupun datuk dan nenek mungkin menawarkan bimbingan dan nasihat yang berharga, adalah penting untuk menghormati autonomi ibu bapa dan kuasa mereka dalam membuat keputusan mengenai anak-anak mereka, terutamanya dalam situasi di mana ibu bapa dan datuk nenek berselisih. Ini adalah penting untuk memastikan keharmonian keluarga terpelihara dan konflik dapat

diminimumkan, memupuk persekitaran keluarga yang menyokong dan bersatu padu di mana keperluan dan kesejahteraan kanak-kanak kekal diutamakan (lihat perenggan 35).]

Cases referred to

Baheerathy a/p Arumugam v V Gunaselan a/l V Visvanathan [2012] 6 MLJ 868; [2013] 1 CLJ 954, HC (refd)
Diana Clarice Chan Chiing Hwa v Tiong Chiong Hoo [2002] 2 MLJ 97; [2002] 1 CLJ 721 ; [2002] 2 AMR 1527, CA (refd)
Gan Koo Kea v Gan Shiow Lih (F) [2003] 4 MLJ 770; [2003] 4 CLJ 539; [2003] 6 AMR 459, HC (refd)
Mahabir Prasad v Mahabir Prasad [1982] 1 MLJ 189; [1981] CLJ Rep 182, FC (refd)
Sean O' Casey Patterson v Chan Hoong Poh & Ors [2011] 4 MLJ 137; [2011] 3 CLJ 722, FC (folld)
Tan Erh Ling v Ong Khong Wooi [2021] MLJU 1583; [2021] 1 LNS 1325, HC (refd)
Tan Sherry (P) v Soo Sheng Fatt (L) [2016] MLJU 1264; [2016] 1 LNS 1586, HC (refd)
Tan Siew Kee v Chua Ah Boey [1988] 3 MLJ 20; [1987] 1 LNS 77, HC (refd)
Tay Bok Choon v Tahansan Sdn Bhd [1987] 1 MLJ 433; [1987] CLJ Rep 24; [1987] MLRA 68, PC (refd)
Teh Eng Kim v Yew Peng Siong [1977] 1 MLJ 234; [1977] 1 LNS 138, FC (refd)

Legislation referred to

Guardianship of Infants Act 1961 ss 6, 11
Law Reform (Marriage and Divorce) Act 1976 s 88(2)

Nicole Wee (with Arthur Wang) (Arthur Wang, Lian & Assoc) for the plaintiff. John Khoo (Ismail Khoo & Assoc) for the defendant.

Evrol Mariette Peters J:

INTRODUCTION

[1] This was the plaintiff's application ('this application') for joint guardianship, as well as joint custody, care, and control of the defendant's child. There was also a prayer by the plaintiff for access to, and physical custody, care, and control of the defendant's child ('the child').

[2] Given the privacy of the parties in this application, and sensitivity of issues in these proceedings, the plaintiff, defendant, and the child have been anonymised respectively as HOM, HOP, and HAY.

THE FACTUAL BACKGROUND

[3] The plaintiff is the maternal grandmother of the child, while the defendant is the father of the child, who was born in June 2010.

[4] The child's mother passed away in February 2020 ('the deceased mother'). The child is now the sole beneficiary of the deceased mother's estate, as well as the maternal grandfather's estate, which the mother had inherited. The maternal grandfather passed away in December 2019 ('the deceased grandfather').

[5] In March 2023, the defendant and the child filed an application, referenced as WA-24NCvC-1091–03 of 2023 ('Suit No 1091'), against the plaintiff, the plaintiff's son ('the uncle'), and other parties. The uncle serves as the executor and trustee of the deceased mother's will, which is the central issue in Suit No 1091. In Suit No 1091, the defendant and child requested, among other things, an accounting of the deceased mother's estate. At the time of the hearing of this application, Suit No 1091 was still pending in another court.

[6] In November 2023, the plaintiff filed this application.

THE ISSUES

[7] The primary issue before the court was whether the plaintiff, as the grandmother of the child, should be granted joint guardianship, as well as joint custody, care, and control of the child, alongside the defendant. This determination required the court to carefully evaluate the dynamics between the parties involved, the child's needs, and the overall family situation.

[8] In addressing the main issue, the further issues were whether the deceased mother had appointed a guardian to the child, and whether the defendant was unfit as a parent to warrant this application.

[9] Additionally, the court had to decide if the plaintiff should be granted access to the child, considering the ongoing legal dispute in Suit No 1091 initiated by the defendant and the child against the plaintiff, the uncle, and other parties. This involved weighing the potential impact of the plaintiff's involvement on the child's welfare and stability amidst the legal conflict.

[10] This application was dismissed for the following reasons.

CONTENTIONS, EVALUATION, AND FINDINGS

Whether deceased mother had appointed a guardian to the child

[11] At the outset, it was crucial to remind the plaintiff and defendant ('the parties') that the starting point of this application was s 6 of the Guardianship of Infants Act 1961 ('Guardianship of Infants Act'). This section stipulates that upon the death of a parent of an infant, the surviving parent, if any, shall, subject to the provisions of the Guardianship of Infants Act, become the guardian of the infant, either alone or jointly with any guardian appointed by the deceased parent. The relevant provision reads:

> Section 6 — Rights of surviving parent as to guardianship
>
> On the death of a parent of an infant, *the surviving parent, if any, shall, subject to this Act, be guardian to the infant either alone or jointly with any guardian appointed by the deceased parent*, and —
>
> (a) if no guardian has been appointed by the deceased parent; or
>
> (b) in the event of the death or refusal to act of the guardian or guardians appointed by the deceased parent, *the court may, if it thinks fit, appoint a guardian to act jointly with the surviving parent*. (Emphasis added.)

[12] It was undisputed that the deceased mother had never appointed a joint guardian to act alongside the defendant. In fact, a previous court order ('the court order'), obtained by the uncle through application No PA-24NCvC-943–12 of 2020, explicitly recognised the defendant as the sole guardian of the child. The court order clarified that the of guardianship, without the involvement of any co-guardian. This prior legal determination underscored the defendant's sole authority over decisions regarding the child's welfare, care, and upbringing, thereby reinforcing the legal basis for the defendant's current guardianship status. This historical context was significant in the deliberation of this court on whether any changes to the guardianship arrangement, such as appointing the plaintiff as a joint guardian, would be appropriate or be in the best interest of the welfare of the child. Paragraph 3 of the court order states:

> *Bahawa penjaga yang sah kepada benefisiari Harta Pusaka Si Mati tersebut iaitu HOP sebagai Pemegang Amanah diberi kuasa yang sepenuhnya* termasuklah tetapi tidak terhad kepada kuasa-kuasa untuk memindahmilik (*transfer*), menyewa (*rent*), memajak (*lease*), menggadaikan (*charge*), melupuskan (*dispose of*) semua atau salah satu Hartanah Stonor tersebut DAN/ ATAU Hartanah Reizz tersebut DAN/ ATAU Kenderaan tersebut dalam pegangan amanahnya demi kepentingan benefisiari kepada Harta Pusaka Si Mati tersebut. (Emphasis added.)

[13] The court, therefore, had to determine if appointing a joint guardian alongside the defendant was necessary. The phrases 'subject to this Act' and 'if

it thinks fit' in s 6 of the Guardianship of Infants Act are indicative that the court must carefully consider the specific facts and circumstances of each case. This mandated a thorough application of the legal principles governing family proceedings, ensuring that any decision would serve in the best interest of the child's welfare. In doing so, the court needed to evaluate factors such as the child's current and future welfare, the relationship between the plaintiff and the child, the impact of a potential joint guardianship on the child's stability, and any relevant history of family dynamics and conflicts.

Consideration of the child's welfare

[14] Prioritising the welfare of the child in the deliberations by the court acts as the 'golden thread' woven throughout all proceedings. This requirement is enshrined not only in s 11 of the Guardianship of Infants Act but also in s 88(2) of the Law Reform (Marriage and Divorce) Act 1976 ('Law Reform (Marriage and Divorce) Act'), both of which read:

> Guardianship of Infants Act 1961
>
> Section 11 — Matters to be considered
>
> The Court or a Judge, in exercising the powers conferred by this Act, shall have regard primarily *to the welfare of the infant* and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be.
>
> Law Reform (Marriage and Divorce) Act 1976
>
> Section 88 — Power of court to make order for custody
>
> ...
>
> (2) In deciding in whose custody a child should be placed the *paramount consideration shall be the welfare of the child* and subject to this the court shall have regard ... (Emphasis added.)

[15] At this juncture, it was crucial to develop a comprehensive understanding of the term 'welfare of the child,' as extensively referenced in numerous legal precedents, including *Teh Eng Kim v Yew Peng Siong* [1977] 1 MLJ 234; [1977] 1 LNS 138, *Mahabir Prasad v Mahabir Prasad* [1982] 1 MLJ 189; [1981] CLJ Rep 182, *Tan Sherry (P) v Soo Sheng Fatt (L)* [2016] MLJU 1264; [2016] 1 LNS 1586 and *Tan Erh Ling v Ong Khong Wooi* [2021] MLJU 1583; [2021] 1 LNS 1325.

[16] I was also guided by the Federal Court in *Sean O' Casey Patterson v Chan Hoong Poh & Ors* [2011] 4 MLJ 137; [2011] 3 CLJ 722, which referenced the Singapore case of *Tan Siew Kee v Chua Ah Boey* [1988] 3 MLJ 20; [1987] 1 LNS 77. In that case, Chan Sek Keong JC (as he then was) elucidated the expression 'welfare of the child' in the following passage:

> The expression 'welfare' ... is to be taken in its widest sense. It means the general well-being of the child and all aspects of *his upbringing, religious, moral as well as physical. His happiness, comfort and security also go to make up his well-being. A loving parent with a stable home is conducive* to the attainment of such well-being. It is not to be measured in monetary terms. (Emphasis added.)

[17] The Federal Court in *Sean O' Casey Patterson v Chan Hoong Poh & Ors*, through the opinion of James Foong FCJ, proceeded to explain 'welfare of the child' in the following passage:

> [53] According to *Halsbury's Laws of England* (4th Ed), reissue (Mackay Ed), para 443 the term, 'welfare principle' is a set of factors used when 'a court determines any question with respect to the upbringing of a child or the administration of a child's property or the application of any income arising from it, the child's welfare must be the court's paramount consideration'. In the English Children Act 1989, under the heading 'welfare of the child' is a set of factors that must be taken into account when deciding on such cases. *These are for example: the wishes of the child; his feelings; his age; his sex and his background and the capabilities of the parties involved*. Thus, this term 'welfare principle' relates to certain factors to be considered and their priority during deliberation in such cases. (Emphasis added.)

[18] To reach a well-informed decision, the court had to meticulously examine the notion of 'welfare of the child' in its broadest context, considering all pertinent factors and judiciously balancing them. Given the unique circumstances of each case, providing an exhaustive list of specific considerations is not feasible.

[19] The crux of the plaintiff's contention was that the child had been cared for by the plaintiff and her family, even when the deceased mother was alive. After the death of the deceased mother, the plaintiff claimed that she had continued to provide for the child financially and lavished the child with luxury. The plaintiff further asserted that the defendant had been an absent father, even during the deceased mother's lifetime.

[20] These averments were vehemently disputed by the defendant. As such, based on the cases of *Diana Clarice Chan Chiing Hwa v Tiong Chiong Hoo* [2002] 2 MLJ 97; [2002] 1 CLJ 721 ; [2002] 2 AMR 1527 and *Gan Koo Kea v Gan Shiow Lih (F)* [2003] 4 MLJ 770; [2003] 4 CLJ 539; [2003] 6 AMR 459, in light of conflicting versions that have not undergone the rigorous test of cross-examination and re-examination, as would have been possible in a full trial with *viva voce* evidence, the court's duty was to disregard disputed facts and make a decision on undisputed facts.

[21] This crucial aspect of civil litigation practice has been eloquently summarised by Lord Templeman for the Privy Council in *Tay Bok Choon v*

Tahansan Sdn Bhd [1987] 1 MLJ 433; [1987] CLJ Rep 24; [1987] MLRA 68, in the following words:

> At the end of the day the judge must decide the petition on the evidence before him. *If allegations are made in affidavits by the petitioner and those allegations are credibly denied by the respondent's affidavits, then in the absence of oral evidence or cross examination, the judge must ignore the disputed allegations*. The judge must then decide the fate of the petition by consideration of the undisputed facts. (Emphasis added.)

[22] Based on the affidavits and exhibits presented, there was no evidence indicating that the defendant was an unfit parent. On the contrary, the evidence demonstrated that the defendant had always been actively involved in the child's life. The records showed consistent care and engagement from the defendant, reinforcing his capability as a responsible parent.

[23] While it was acknowledged that the child had spent significant time with her grandparents, this arrangement occurred with the defendant's consent. The defendant had not objected to these visits, particularly because the deceased grandfather was very fond of the child. However, there was no evidence to suggest that the plaintiff and her family had ever taken on a substitute parental role for the defendant. Furthermore, it would be inequitable to hold the defendant's decision, to permit the child to spend time with her grandparents, against him. This decision was made out of consideration for the child's relationship with her deceased grandfather, and not as an abdication of parental responsibility.

[24] Given this context, it was clear that the defendant had maintained his primary role in the child's upbringing and had not relinquished his parental responsibilities to the plaintiff or her family. Thus, it was my view that the defendant should retain sole guardianship and custody of the child, as this would best serve the child's welfare and ensure stability in her care and upbringing.

[25] My decision was further bolstered by the fact that since both defendant and the child had initiated Suit No 1091 against the plaintiff and her family, granting guardianship and custody to the plaintiff, even on a joint basis, would inevitably lead to conflict.

[26] While several allegations were made by the defendant and the child in Suit No 1091 against the plaintiff and her family, including claims of fraudulent transfer of the deceased mother's share to the uncle, and allegations regarding the uncle's sexual orientation, it was crucial to note that these issues were not before this court to address.

[27] However, the ongoing litigation signified a significant degree of discord and unresolved issues between the defendant and child on one hand, and the plaintiff and her family on the other. This discord would likely intensify if the plaintiff and defendant were required to share guardianship and custody responsibilities. Such a contentious environment would not be conducive to the child's welfare and could create an unstable and stressful situation for her. The evident acrimony between the plaintiff and defendant indicated future disputes, likely to create a toxic environment for the child.

[28] It was undisputed that constant exposure to conflict could lead to emotional distress and instability in the child, impacting her mental and emotional development negatively. Witnessing ongoing conflict between her guardians, if this application was allowed, could be emotionally harmful, leading to feelings of guilt, loyalty conflicts, and a sense of being caught in the middle. The child may also internalise the hostility between her guardians, affecting her self-esteem and interpersonal relationships.

[29] Such acrimony may also result in vastly different parenting styles and values, leading to inconsistency in discipline, routines, and expectations for the child. This lack of consistency could confuse the child and create additional stress.

[30] I was mindful that the plaintiff was requesting joint guardianship and custody with the defendant, rather than seeking sole guardianship or custody. However, it was crucial to emphasise that joint guardianship and custody entail co-parenting, requiring open communication, compromise, and a focus on the child's needs. In this case, the acrimony between the plaintiff and defendant would impede constructive communication, making it difficult to make joint decisions regarding the child's upbringing, education, healthcare, and other important matters. On this note, reference was made to the case of *Baheerathy a/p Arumugam v V Gunaselan a/l V Visvanathan* [2012] 6 MLJ 868; [2013] 1 CLJ 954 where one of the reasons for granting sole guardianship, as well as sole custody, care, and control to one parent was due to the acrimonious relationship between the parties.

[31] It was apparent that the plaintiff and her family felt entitled to dictate the terms of the child's upbringing, largely due to their control over financial resources. However, control of financial assets should not be the decisive factor in determining eligibility for guardianship and custody.

[32] Given this context, I had to agree with the defendant that there was a very high likelihood of the plaintiff and her family unduly influencing the child. In such circumstances, allowing this influence would be inappropriate. Therefore, I concluded that it would be prudent to deny even access to the

child to the plaintiff, to safeguard the child's well-being and ensure an environment free from undue pressure.

[33] The defendant also brought to the court's attention the timing of this application, noting that it was filed nine months after the initiation of Suit No 1091. This timing raised questions about the genuine intentions behind this application.

CONCLUDING REMARKS

[34] Grandparents undoubtedly hold a distinctive and valuable place within the family dynamics. Their wisdom, experience, and unconditional love often enrich the lives of their grandchildren in profound ways. However, it was crucial to acknowledge that their role is not intended to supplant that of parents but rather to complement and bolster it. They may step in as caregivers, particularly in situations where parents are unavailable due to work commitments, illness, or other responsibilities. Their support can be invaluable in easing the burdens of modern family life, and providing a safe and nurturing environment for grandchildren to thrive.

[35] However, maintaining a delicate balance in the grandparent-grandchild relationship is essential. While grandparents may offer valuable guidance and advice, it is crucial to respect the autonomy of the parents and their authority in decision-making regarding their children, particularly in situations where parents and grandparents are at odds. This is crucial to ensure that familial harmony is preserved and that conflicts are minimised, fostering a supportive and cohesive family environment where the needs and well-being of the children remain paramount.

[36] In conclusion, after considering the aforementioned arguments and conducting a thorough examination of all the evidence presented to this court, encompassing both written and oral arguments from both parties, this application was dismissed with costs.

Application dismissed.

Reported by K Selvaraju